DEDICATED INDIVIDUALS WHO MOTIVATE THE DEVELOPMENT OF INTERNATIONAL LAW AND THE OBLIGATION TO "PREVENT" CRIMES AGAINST HUMANITY

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ABSTRACT

In honoring Professor Leila N. Sadat, this essay will address two related topics. First, it considers how the international community or a large organization such as the United Nations can be "moved" toward the development of international law, and reflects on the importance of dedicated individuals, such as Professor Sadat, in contributing toward such momentum. Second, it examines the importance of concluding a crimes against humanity convention—a project to which Professor Sadat has devoted many years. Specifically, it looks at the divisive debate that has periodically occurred as to whether crimes constitute "genocide" or not, while time and lives are lost, with the resulting consequence often being inaction by states. While having a convention cannot alone create the political "will" to act, it could at least provide a clear legal framework, including the obligation to "prevent" crimes against humanity, which would then parallel the obligation to "prevent" genocide found in the Genocide Convention.[1] That legal development could contribute to avoiding paralysis by states that mistakenly appear to perceive a duty to act to stop crimes only if they constitute genocide.

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1 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277 ("Genocide Convention").

I. THE IMPORTANCE OF DEDICATED INDIVIDUALS WHO MOTIVATE THE DEVELOPMENT OF INTERNATIONAL LAW

One might well ask: how does one "move" an organization such as the United Nations toward the creation of international law? Specifically, how is momentum developed to create a convention at the international level that perhaps well over 100 states' delegations join in negotiating and, hopefully, having their countries ratify. While moments of self-doubt must be inevitable when goals are so lofty, former Nuremberg Prosecutor Benjamin B. Ferencz has always said: "It takes courage not to be discouraged."[2] Professor Sadat is one of those individuals who works on such lofty goals, despite the seemingly formidable task facing her and the international community—codifying an international multilateral convention on crimes against humanity.

It is not merely an adage that powerful ideas often start with one dedicated person. History is replete with examples and this is true in the field of international law. The International Committee of the Red Cross was created after Henri Dunant wrote his memoir, *A Memory of Solferino*,[3] about the tens of thousands left dead, wounded, and dying on the battlefield at Solferino, Italy, in 1859, after a battle between the French and Austrian armies.[4] Austrian Baroness Bertha von Suttner propelled the early peace movement by writing about the horrors of war in *Die Waffen Neider!* (*Lay Down Your Arms!*), published in 1889.[5] Their works helped propel negotiations that led to the conclusion of the early Hague and Geneva Conventions, designed to mitigate some of the most horrific aspects of war. The peace movement was furthered by the founding, in 1913, of the Peace Palace (*Vredespaleis*) in The Hague, Netherlands,[6] conceived of as a forum

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2 *60 Minutes* (CBS television broadcast May 7, 2017).

3 Henri Dunant, *A Memory of Solferino* (1939) (translated from French by the American Red Cross, edited by the International Committee of the Red Cross).

4 John Simkin, *Henri Dunant*, SPARTACUS EDUCATIONAL (Sept. 1997), https://spartacus-educational.com/EUdunant.htm ("Over 300,000 men of the Austrian and French armies took part in the Battle of Solferino [that] resulted in the deaths of over 41,000 men. It is estimated another 40,000 men who took part in the battle later died from wounds, fever and disease.").

5 Professor Hope May writes: "*Die Waffen Nieder*! (Lay Down Your Arms!) originally published in 1889, . . . became an international bestseller and propelled [von Suttner] into the forefront of the peace movement. [Leo] Tolstoy would later comment that Suttner was the 'Harriet Beecher Stowe of the Peace Movement'; Suttner's labors inspired Alfred Nobel (for whom she briefly worked) to create his [famous] Peace Prize of which she was the first female recipient (in 1905)." Hope Elizabeth May, *The March 1st Movement and the Red Thread of International Peace History*, 50 KOREA OBSERVER 207, 208 n. 2 (2019) (citation omitted); *see also* Simkin, *supra* note 4 (describing the early origins of the peace movement).

6 *History*, CARNEGIE FOUND. PEACE PALACE, https://www.vredespaleis.nl/peace-

where states would arbitrate, and later, litigate rather than using force to settle disputes.[7] Examples of significant individuals who made these sorts of crucial contributions go all the way back to early scholarly writers on international law, such as Hugo Grotius (Hugo de Groot).[8]

Scholars in the field all know of the work of Raphael Lemkin, who coined the term "genocide" to describe the intentional eradication of a group of people because of their group membership (e.g., Nazi extermination of the Jewish populations of Europe as well as Ottoman extermination of Armenians).[9] He then worked tirelessly toward codification of the Genocide Convention and devoted the remaining decades of his life to convincing states to become parties to the convention.[10]

More recently, we have seen momentum created by individuals who launched civil society initiatives; two in particular come to mind. In 1992, Jody Williams created an NGO coalition, the International Campaign to Ban the Use of Landmines ("ICBL"),[11] of which she was the founding coordinator. Williams and the ICBL were seminal in concluding the Ottawa Landmines Convention.[12] In 1998, when states' delegations and civil

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palace/history/?lang=en (last visited Feb. 2, 2022).

7 Professor Hope May explains:

> In Suttner's Memoirs, one finds an aptly titled chapter, "There is a Peace Movement" wherein she explains how she came to learn about the organized peace movement which at Suttner's time, was also known as the "Peace through Law" movement . . . . In the early 19th century, the peace movement was focused on the creation of a new international court, one that enabled states to solve disputes through the non-violent method of international arbitration, rather than by armed force.

May, *supra* note 5, at 208 (citation omitted). The Peace Palace was built "to house the Permanent Court of Arbitration (PCA) and a library. Soon after, they were joined by the Permanent Court of International Justice." *Jurisdiction*, CARNEGIE FOUND. – PEACE PALACE, https://www.vredespaleis.nl/jurisdiction/?lang=en (last visited Feb. 2, 2022).

8 His writings included *De Jure Belli ac Pacis* (*On the Law of War and Peace*) (1625) and *Mare Liberum* (*The Freedom of the Seas*) (1609).

9 *See, e.g.*, Maria Luisa Piqué, *Beyond Territory, Jurisdiction, and Control: Towards a Comprehensive Obligation to Prevent Crimes Against Humanity* 165 (FICHL Publication Series No. 20, 2014) (Lemkin coined the word "genocide" "to describe the Ottoman atrocities against the Armenian and the Nazi atrocities against the Jews"). "Genocide" is a word that combines the Greek word *enos* ("race, people") and the Latin suffix *–cide* ("act of killing"). Gregory H. Stanton, *What is Genocide?*, GENOCIDE WATCH (2002), http://genocidewatch.net/genocide-2/what-is-genocide.

10 For discussion of the decades-long work of Raphael Lemkin, *see* SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 47–60 (2013); PHILIPPE SANDS, EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY (2016).

11 For her writing, *see, e.g.*, Shawn Roberts & Jody Williams, *After the Guns Fall Silent: The Enduring Legacy of Landmines* (Vietnam Veterans of America Foundation, 1995); *Banning Landmines: Disarmament, Citizen Diplomacy and Human Security* (Jody Williams, Stephen D. Goose & Mary Wareham eds., 2008).

12 The full title is the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997.

society came together in Rome, Italy, to conclude negotiations of the Rome Statute of the International Criminal Court ("ICC"),[13] civil society efforts were led by the Coalition for an International Criminal Court (the "CICC"). The CICC is an NGO coalition, originally created by William R. Pace,[14] that has included over 2,500 NGO members dedicated, first, to the founding of, and later to furthering the work of, the ICC.[15] Another significant NGO coalition has been the International Campaign to Abolish Nuclear Weapons ("ICAN"), founded in 2007, which helped propel the conclusion of the Treaty on the Prohibition of Nuclear Weapons.[16] Both Williams and the ICBL, as well as ICAN, received Nobel Peace Prizes for their work, as did von Suttner, nearly a century prior.[17]

During negotiations of the crime of aggression amendment to the ICC's Rome Statute,[18] which I had the privilege of attending, one saw the dedicated efforts of a number of individuals. Two in particular come to mind: former Nuremberg Prosecutor Benjamin B. Ferencz and Liechtenstein Ambassador Christian Wenaweser.[19] When the Rome Statute

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13 Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 ("Rome Statute"). Because the negotiations were divided into different topics, no single person has all of the knowledge of the negotiations. For books on the negotiations, *see, e.g.*, FANNY BENEDETTI, JOHN L. WASHBURN & KARINE BONNEAU, NEGOTIATING THE INTERNATIONAL CRIMINAL COURT: NEW YORK TO ROME 1994–1998 (2014); ANDREAS ZIMMERMANN, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, AND RESULTS (Roy S. Lee ed., 1999).

14 The Coalition's name switched slightly after Rome to the Coalition for *the* International Criminal Court. For background on William Pace, *see, e.g.*, *William Pace*, NEW TACTICS IN HUM. RTS., https://www.newtactics.org/users/william-pace (last visited Feb. 3, 2022).

15 COAL. FOR THE INT'L. CRIM. CT., https://coalitionfortheicc.org/ (last visited Feb. 3, 2022) (claiming to represent 2,500 civil society organizations in 150 countries).

16 Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161.

17 ICBL and Williams (1997), ICAN (2017), Bertha von Suttner (1905). *Laureates*, THE NOBEL PEACE PRIZE, https://www.nobelpeaceprize.org/laureates/?offset2438=5 (last visited Feb. 3, 2022).

18 While the crime formed the basis of Counts 1 and 2 of the Indictment at Nuremberg and was prosecuted before the International Military Tribunal for the Far East (Tokyo), it thereafter somewhat languished in terms of international legal developments. *See* The United States of America, et. al., v. Goering et al., Indictment, International Military Tribunal, Counts 1 and 2. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Trial of War Criminals 21 (1945); Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, *amended* Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20. Yet, the delegates at Rome concluded that the crime of aggression was one of the "most serious crimes of concern to the international community" and needed to be included in the Rome Statute as one of the four crimes within the ICC's jurisdiction. *See* Rome Statute, *supra* note 13, Art. 5(1).

19 Individual members of civil society and supportive individuals within delegations also pressed for the successful inclusion of the crime of aggression into the Rome Statute. Several members of delegations come to mind, particularly Claus Kress, now Special Adviser to the ICC Prosecutor on the Crime of Aggression and previously a member of the German delegation, as well as Roger S. Clark, an eloquent and committed member of the Samoan delegation. Major NGOs such as Human Rights Watch and Amnesty International were unsupportive during the negotiations. *See* NOAH WEISBORD, THE CRIME OF AGGRESSION: A COMMENTARY (Claus Kress & Stefan Barriga eds., 2017) (ch. Civil Society).

was concluded in 1998, delegates were unable to agree on the definition of the crime of aggression and the conditions for the exercise of the ICC's jurisdiction over it, so a "placeholder" was left in Article 5(2) of the Rome Statute. Thus, while the crime was one of the four crimes over which the ICC would have jurisdiction, negotiations on it still needed to be concluded.[20]

Ferencz provided the "moral compass" for these negotiations. Whenever negotiations seemed intractable, Ferencz would remind the assembled delegates of the importance of their work—basically, to create enforcement of the UN Charter's prohibition on aggressive use of force[21] (i.e., to impose consequences for leaders who start aggressive war, as had been prosecuted before the International Military Tribunal at Nuremberg).[22] Ferencz was well-positioned to speak on the topic. He had witnessed firsthand the horrors of World War II, first when he gathered crime evidence traveling from extermination camp to extermination camp, and then, at the age of 22, when he became chief prosecutor of the *Einsatzgruppen* trial at Nuremberg.[23] The trial involved mobile SS (*Schutzstaffel*) execution squads that operated in occupied Eastern Europe, and were charged with the deaths of 1.3 million Jews.[24] Ferencz's early work motivated a lifetime of writing on the crime of

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See also Letter from Ken Roth to Foreign Ministers of States Parties, *ICC: Review Conference is Opportunity to Advance the Fight Against Impunity*, HUMAN RIGHTS WATCH (Apr. 12, 2010) (expressing HRW's opposition to concluding the negotiations).

20 *See* Rome Statute (original version), *supra* note 13, Art. 5(2).

21 The crime of aggression reinforces the use of force regime in the UN Charter—that "use of force" is prohibited under Article 2(4), unless it is authorized by the UN Security Council acting under Chapter VII or permitted under Article 51 as the exercise of individual or collective self-defense. *See* UN Charter, Art. 2(4), Chapter VII, Art. 51. There is also arguably enough legitimacy to something that resembles a "bona fide" "humanitarian intervention" that it would not be covered by the definition of the crime. *See* Jennifer Trahan, *Defining The "Grey Area" Where Humanitarian Intervention May Not Be Fully Legal, But is Not The Crime of Aggression*, 2 J. USE OF FORCE & INT'L L. 42 (2015).

22 The United States of America, et. al., *supra* note 18, Counts 1–2; *see also Indictment from the International Military Tribunal for the Far East*, HARRY S. TRUMAN LIBR. MUSEUM, https://www.trumanlibrary.gov/library/research-files/indictment-international-military-tribunal-far-east?documentid=NA&pagenumber=1.

23 *The United States of America v. Otto Ohlendorf, et al. (Einsatzgruppen Case)*, Trials of War Criminals Before the Nuernberg Military Tribunals, Vol. IV, Oct. 1946–Apr. 1949. This was one of the trials held after the main trial held by the International Military Tribunal at Courtroom 600 in Nuremberg. The subsequent trials (twelve in total) were conducted in the same courtroom but by the United States. *Memorium Nürnberger Prozesse, Museen der Stadt Nürnberg*, The Subsequent Nuremberg Trials, NUREMBERG MUSEUMS, https://museums.nuernberg.de/memorium-nuremberg-trials/the-nuremberg-trials/the-subsequent-nuremberg-trials/.

24 The execution squads were also responsible for mass executions of Roma, "partisans," the disabled, and homosexuals. *Minority Victims of the Holocaust*, HOLOCAUST MUSEUM HOUS., https://hmh.org/library/research/minority-victims-guide/ (last visited Mar. 7, 2022). For background, see KEVIN JON HELLER, THE NUREMBERG TRIALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW (2002).

aggression and the need for a more peaceful world.[25]

While several individuals led different parts of the crime of aggression negotiations, much of the work was concluded while Liechtenstein Ambassador Christian Wenaweser served as the chairperson.[26] He skillfully steered states away from topics when negotiations became too contentious, bracketing those issues for later consideration,[27] and moving the delegates to where progress could be made. Negotiating text in a conference room where delegations from potentially over 100 states may intervene was far from easy. Wenaweser first managed to get delegations to reach agreement on the definition of the crime.[28] Then, at the 2010 ICC Review Conference in Kampala, Uganda, he, along with Zeid Ra'ad Al Hussein of Jordan,[29] was able to lead delegates in concluding the seemingly previously intractable issue of the jurisdictional regime.[30] The final results are imperfect in that, in 2010, non-States Parties were completely excluded from the jurisdictional regime,[31] and in 2017, two states were able to dramatically curtail (or

25 *See* Benjamin Ferencz, A Former Prosecutor at the Nuremberg War Crimes Trials, *at* Benjamin B. Ferencz | Official Website (benferencz.org); Federica D'Alessandra, *"Law, Not War": Ferencz' 70 Year Fight for a More Just and Peaceful World* (TOAEP Occasional Paper Series, 2018), *at* 'Law, Not War': Ferencz' 70-Year Fight for a More Just and Peaceful World (toaep.org).

26 Subsequent to the Rome Conference, negotiations first occurred during Preparatory Commission meetings, and then, after the Rome Statute entered into force, in meetings of the Special Working Group on the Crime of Aggression ("SWGCA"), chaired by Ambassador Wenaweser. The work of the SWGCA was concluded at the second resumption of the ICC's Assembly of States Parties ("ASP") 7 in February 2009. Once the definition was finished in 2009, negotiations went back to a few sessions of the ASP—ASP 8 in November 2009, and the resumed eighth session in March 2010—and then the Kampala Review Conference in 2010 (with Ambassador Wenaweser chairing the Review Conference and Zeid Ra'ad Al Hussein serving as chair of the Working Group on the Crime of Aggression). At the Review Conference, the jurisdictional conditions were adopted—although a subsequent debate ensued after Kampala, in which the agreement reached was reinterpreted by some. The final decision to activate the Court's ability to exercise its jurisdiction was taken at the ASP meeting in 2017. Activation of the Jurisdiction of the Court Over the Crime of Aggression [hereinafter Activation Resolution], ICC-ASP/16/Res.5, Dec. 14, 2017.

27 A particularly contentious topic during the early years of the negotiations within the SWGCA was whether the Security Council needed to "predetermine" whether aggression had occurred before the ICC could hear a case. While staunchly advocated by the permanent members of the Security Council who attended the negotiations, this position was ultimately rejected, although the Security Council may make referrals, and has some role otherwise. *See* Rome Statute, *supra* note 13, Art. 15*ter*; Art 15*bis*, ¶¶ 6–8.

28 This became Rome Statute, Art. 8*bis*. *See supra* note 13.

29 Zeid served as President of the ICC's Assembly of States Parties and would later serve as High Commissioner for Human Rights.

30 The Rome Statute envisioned that the crime of aggression could have a different jurisdictional regime than the crimes of genocide, crimes against humanity, and war crimes. *See* Rome Statute, *supra* note 13, Art. 5.2 (original version).

31 In Kampala, the US (along with several other states) was able to negotiate a complete carve-out of jurisdiction for the nationals of, and crimes committed on the territory of, non-States Parties. *See* Rome Statute, *supra* note 13, Art. 15*bis*, ¶ 5.

arguably curtail)[32] the crime's jurisdictional reach.[33] Nonetheless, it remains extremely significant that the crime was activated—which occurred at the ICC's Assembly of States Parties in 2017, with jurisdiction effective July 2018.[34]

As to crimes against humanity, it seems odd that they lack a freestanding convention,[35] since such crimes were already prosecuted in 1945–46 before the Nuremberg Tribunal,[36] included in the London Charter that established the Tribunal,[37] encompassed by the "Nuremberg Principles" finalized in 1946 by the General Assembly,[38] and codified by the International Law Commission ("ILC") in 1950.[39] Yet, many countries, the US included,[40] lack

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32 For an article questioning whether the ASP could validly limit the Kampala crime of aggression amendment's jurisdictional regime through a resolution as opposed to a statutory amendment, see Jennifer Trahan, *From Kampala to New York—The Final Negotiations to Activate the Jurisdiction of the International Criminal Court Over the Crime of Aggression*, 18 INT'L CRIM. L. REV. 197 (2018).

33 The United Kingdom and France led this effort.

34 Activating Resolution, *supra* note 26. Activation (and subsequent ratification by states) could also spur states to implement the crime of aggression into their national laws.

35 The crime of aggression also lacks a freestanding convention, although the prohibition on the aggressive use of force (but not the crime of aggression) is a core part of the UN Charter and the General Assembly in 1974 memorialized a (non-binding) definition of aggression. *See* UN Charter, Art. 2(4); GA Res. 3314.

36 The United States of America, et. al., *supra* note 18, Count 4.

37 Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 9, 1945, 58 Stat. 1544, 82 UNTS 280.

38 Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly resolution 95 (I), New York, Dec. 11, 1946. Antonio Cassese explained:

> In resolution 95 (I), the General Assembly affirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal ("the Nürnberg principles"). By "affirming" those principles, the General Assembly (consisting at the time of fifty-five Member States) clearly intended to express its approval of and support for the general concepts and legal constructs of criminal law that could be derived from the IMT Charter and had been set out, either explicitly or implicitly, by the IMT.

Antonio Cassese, *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, Introductory Note*, United Nations Audiovisual Library of International Law, at Introductory Note - Antonio Cassese, President of the Special Tribunal for Lebanon - English.

39 Documents of the second session, including the report of the Commission to the General Assembly, 1950 2 Y.B. Int'l L. Comm'n 374, UN Doc. A/CN.4.SER.A/1950/Add.1.

40 Former US War Crimes Ambassador, David J. Scheffer, is working to try to remedy the gap in US law, promoting passage of such legislation. *See* Leila N. Sadat & Mark Drumbl, *The United States and the International Criminal Court: A Complicated, Uneasy, yet at Times Engaging Relationship,* Wash. U. Sch. Of L. in St. Louis Legal Stud. Rsch. Series No. 16-07-02, at 14–15 ("The American Bar Association (ABA) has urged Congress to enact legislation to prevent and punish crimes against humanity . . . . The ABA adopted a Resolution supporting the adoption of federal legislation on Crimes against Humanity in 2014, and a task force chaired by former Ambassador David Scheffer is currently working on this."). If Rome Statute States Parties want to be in a position to exercise "complementarity" under the Rome Statute, they should also have implemented crimes against humanity into their domestic laws, although not all countries have done so**.** *See States: Join ICC Cooperation Treaty (APIC)*, COAL. FOR THE INT'L CRIM. CT. (Aug. 1, 2017), https://www.coalitionfortheicc.org/news/20170801/states-join-icc-cooperation-treaty-apic.

domestic legislation criminalizing crimes against humanity; the absence of a multilateral treaty on crimes against humanity has likely been a contributing factor.[41] It was distinguished international law professor M. Cherif Bassiouni[42] who first pressed the idea for a freestanding convention on crimes against humanity.[43] He also—very much ahead of his time—called for the creation of an International Criminal Court already in 1987.[44]

While Bassiouni initially championed the idea of a crimes against humanity convention, it was Professor Sadat who took up the project with zeal, through the Whitney R. Harris World Law Institute[45] at Washington University School of Law, of which she served as Director.[46] There, in 2008 she created the "Crimes Against Humanity Initiative," as a research and advocacy project to study the need for, draft, and then advocate for, a comprehensive convention on crimes against humanity.[47] For the past 14

41 "The category of crimes against humanity has been incorporated into domestic laws at far lower rates [than genocide and war crimes]. This is due in part to the fact that crimes against humanity lacks its own dedicated treaty regime." Mark S. Berlin, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 L. & SOC'Y REV. 533, 540 (2017).

42 Bassiouni, who was a professor of law at DePaul University, held numerous UN appointments, and was an extremely prolific scholar who influenced the development of a number of international criminal tribunals. *See* Jeff Carrion, In Memoriam, *Emeritus Professor of Law M. Cherif Bassiouni*, DEPAUL NEWSROOM (Sept. 27, 2017), https://resources.depaul.edu/newsroom/news/press-releases/Pages/in-memoriam-Cherif-Bassiouni.aspx. He was nominated for the Nobel Peace Prize in 1999. *Id*. Bassiouni also served on the Steering Committee of The Crimes Against Humanity Initiative, created by Professor Sadat.

43 Sadat explains: "M. Cherif Bassiouni underscored this problem in an important, but little noticed, article appearing in 1994 entitled '"Crimes Against Humanity": The Need for a Specialized Convention,' in which he lamented the 'existence of a significant gap in the international normative proscriptive scheme, on which is regrettably met by political decision makers with shocking complacency.'" Leila N. Sadat, *Preface and Acknowledgements* to FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, xxii (Leila N. Sadat ed., 2011) (*citing* M. Cherif Bassiouni, "*Crimes Against Humanity": The Need for a Specialized Convention*," 31 COLUM. J. TRANSNAT'L L. 457, 457 (1994)).

44 *See* M. Cherif Bassiouni, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987). For later writing on the topic, *see* M. Cherif Bassiouni, *Revisiting the Architecture of Crimes Against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining – the Need for a Specialized Convention*, in Sadat, *supra* note 43, at 43.

45 The Institute was named after Whitney R. Harris, a former Nuremberg Prosecutor, who "along with his fellow trial counsel, first prosecuted crimes against humanity at Nuremberg." Sadat, *supra* note 43, at xxvii.

46 WHITNEY R. HARRIS WORLD L. INST., https://law.wustl.edu/faculty-and-research/whitney-r-harris-world-law-institute/.

47 "[A] preliminary draft text of the convention [was] prepared by Cherif Bassiouni." Sadat, *supra* note 43, at xxv. Subsequently, the Initiative produced a "*Proposed Convention on the Prevention and Punishment of Crimes Against Humanity*" as a model for the treaty. *See*, *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, WASH. UNIV. SCH. OF L. WHITNEY R. HARRIS WORLD L. INSTITUTE CRIM. AGAINST HUMAN. INITIATIVE (Aug. 2010), https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2019/02/EnglishTreatyFinal.pdf.

years, Professor Sadat has advocated tirelessly for such a convention,[48] including with UN Member States. Without her contributions, the ILC might never have drafted the crimes against humanity convention[49] that is now being debated in the Sixth Committee of the UN General Assembly.[50] As of this writing, more effort is needed to ensure the Convention's passage, and, if successful, the subsequent ratification of the convention by states. Thus, after years of dedication, Professor Sadat's work is not yet complete. Yet, based on her work to date, one can most definitely say that she is one of the individuals who, through single-minded determination, has contributed to the development of international law.[51]

II. SOLIDIFYING THE OBLIGATION TO "PREVENT" CRIMES AGAINST HUMANITY THROUGH A CRIMES AGAINST HUMANITY CONVENTION

There is a myriad of reasons why a crimes against humanity convention is needed; this essay will focus on one—codifying a clear obligation to "prevent" crimes against humanity. A starting premise is that, first, there is simply a gap in the law: despite being included in 1945–46 as a crime before the Nuremberg Tribunal, this core atrocity crime—which can encompass extermination (i.e., mass murder) as well as numerous other underlying crimes[52]—is simply lacking a convention. Shortly after the Nuremberg Trials, the Genocide Convention[53] was concluded, as well as the four 1949

48 She was joined by a distinguished Steering Committee composed of, in addition to Professor Sadat: Professor M. Cherif Bassiouni, Ambassador Hans Corell, Justice Richard Goldstone, Professor Juan Méndez, Professor William Schabas, and Judge Christine Van Den Wyngaert.

49 For information on the convention, *see* Int'l L. Comm'n, Crimes Against Humanity, Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on Second Reading Prevention and Punishment of Crimes Against Humanity, May 15, 2019, UN Doc. A/CN.4/L.935, http://legal.un.org/docs/?symbol=A/CN.4/L.935 (draft crimes against humanity convention).

50 "The Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly. All the United Nations Member States are entitled to representation on the Sixth Committee as one of the main committees of the General Assembly." *Sixth Committee (Legal)*, UNITED NATIONS, https://www.un.org/en/ga/sixth/ (last visited Feb. 6, 2022).

51 Many additional individuals could no doubt warrant inclusion; this discussion is not intended to be comprehensive.

52 In the ICC's Rome Statute, for example, the crimes underlying "crimes against humanity" are: murder, extermination, enslavement, deportation, imprisonment, torture, rape or sexual violence, persecutions, enforced disappearances, apartheid, and other inhumane acts. For the precise terminology, *see* Rome Statute, *supra* note 13, at Art. 7(1)(a)–(k).

53 Genocide Convention, *supra* note 1.

Geneva Conventions,[54] codifying various war crimes,[55] but no corollary convention was created for crimes against humanity. Yet, the crime was included in the Statutes of, and prosecuted before, the International Criminal Tribunal for the former Yugoslavia,[56] the International Criminal Tribunal for Rwanda,[57] the Special Court for Sierra Leone,[58] and the Extraordinary Chambers in the Courts of Cambodia;[59] additionally, it is included in the ICC's Rome Statute,[60] binding on its 123 States Parties.[61]

One might then ask, if the crime is being prosecuted at the international level, and at least the Rome Statute's 123 States Parties agree on the definition, why is a convention still required? One answer is that a convention can go beyond simply defining the crime, to providing a legal

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54 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 75 U.N.T.S. 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12 1949, 75 U.N.T.S. 85; Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12 1949, 75 U.N.T.S. 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [collectively hereinafter, "1949 Geneva Conventions"]. Significant updates occurred with Protocols I and II in 1977. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 ("Protocol I"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 ("Protocol II").

55 The 1949 Geneva Conventions codify both "grave breaches" (war crimes if committed during international armed conflict) and Common Article 3 violations (war crimes if committed during non-international armed conflict). *See Grave Breaches Specified in the 1949 Geneva Conventions and in Additional Protocol I of 1977*, INT'L COMM. RED CROSS, https://www.icrc.org/eng/resources/documents/misc/57jp2a.htm; 1949 Geneva Conventions, *supra* note 54, at Common Art. 3.

56 Statute of the Int'l Tribunal for the former Yugoslavia, Art. 4, UN SCOR, 48th Sess., 3217th Mtg., at 5, UN Doc. S/RES/827 (1993) ("ICTY Statute"). For a compilation of ICTY cases on crimes against humanity, *see* JENNIFER TRAHAN, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 192–352 (Human Rights Watch, 2006).

57 Statute of the Int'l Tribunal for Rwanda, Art. 2, UN SCOR, 49th Sess., 3453rd Mtg., at 2, UN Doc. S/RES/955 (1994) ("ICTR Statute"). For a compilation of ICTR cases on crimes against humanity, see JENNIFER TRAHAN, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 82–146 (Human Rights Watch, 2010).

58 UN Security Council, Statute of the Special Court for Sierra Leone, REFWORLD (Jan. 16, 2002), https://www.refworld.org/docid/3dda29f94.html.

59 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), ECCC.GOV., https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

60 Rome Statute, *supra* note 13, Art. 7.

61 *The States Parties to the Rome Statute*, INT'L. CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

framework that contains a variety of related obligations. One of these could be a clear obligation to "prevent" crimes against humanity, which is not yet included in any codified treaty source.[62] By contrast, as mentioned, there is an obligation to "prevent" genocide contained in the Genocide Convention;[63] there is also an obligation to "ensure respect for" the Geneva Conventions, contained in their Common Article 1.[64] Articulating such a clear "hard law" legal obligation might help alleviate the impasse that periodically occurs in the international arena when experts, NGOs, and states expend time, in the face of mass killing, debating whether or not "genocide" is occurring, instead of devoting their efforts to preventing the

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62 There most likely already is an obligation to act to prevent crimes against humanity. The ILC, in its Articles on State Responsibility, states that there is a prohibition on states rendering "aid or assistance in maintaining" a situation of a serious breach of an obligation arising under a peremptory norm, and requires states to "cooperate to bring to an end" such breaches. Int'l L. Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (adopted), Art. 41, UN Doc. A/56/10 (Dec. 12, 2001). While crimes against humanity are peremptory norms of international law, *id*., Art. 26, the weight of Article 41 is sometimes disputed. *Compare* Erica de Wet, *Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments Through Direct Military Assistance on Request*, 67 INT'L & COMP. L. Q. 3, 23–24 (2018) (it is "disputed" whether the obligations of Article 41 reflect customary international law); *with* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 200 ¶ 159 (July 9) (utilizing Article 41: ". . . all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation . . . ."). Until recognition of this obligation is more widely accepted, it would be useful to have the obligation to prevent crimes against humanity clearly codified in a treaty, as some appear to regard much of R2P's "prevention" agenda, as merely "soft law." *See infra* note 80. Another benefit of concluding a crimes against humanity convention could be to propel more states to implement crimes against humanity into national legislation. Another scholar explains additional benefits that a treaty could provide:

> A comprehensive treaty on crimes against humanity can provide, at the very least, a crucial advocacy tool for human rights activists, international organizations, potential or current victims of crimes against humanity, and States interested in eradicating those crimes. It can also be a useful tool for setting the agenda, mobilizing and empowering potential and actual victims of crimes against humanity, and litigating against States and individuals that engage in those practices. In other words, the establishment of authoritative principles in an international treaty is 'a crucial element in empowering individuals to imagine, articulate, and mobilize as rights holders.'
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> Piqué, *supra* note 9, at 162.

63 Genocide Convention, *supra* note 1, Art. 1.

64 1949 Geneva Conventions, *supra* note 54, Common Art. 1. The same Common Article 1 is found in Protocols I and III. *See* Protocol I, *supra* note 54; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem December 8, 2005 ("Protocol III"). "The autonomous duty to prevent crimes against humanity is also consistent with the practice of States in concluding numerous . . . treaties . . . that feature a duty to take steps to prevent particular crimes such as terrorism, human trafficking and hostage taking." Charles C. Jalloh, *The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?*, 52 CASE W. RES J. INT'L L. 331, 361 (2020); *see also* Sean D. Murphy, *Codifying the Obligations of States Relating to the Prevention of Atrocities*, 52 CASE W. RES J. INT'L L. 27, 30–33, 34–35 (2020) (listing treaties with obligations to "prevent" and tracing human rights treaties that have similar obligations).

crimes, regardless of nomenclature. Concluding and bringing into force a crimes against humanity convention with a clear obligation to "prevent" crimes against humanity would make it clear that states owe the same obligation with regard to crimes against humanity as they owe vis-à-vis the crime of genocide.[65]

The trajectory that started this debate—appropriately emphasizing the importance of the crime of genocide but perhaps inadvertently deemphasizing the oftentimes horrific nature of crimes against humanity (as well as war crimes and the crime of aggression)[66] may trace to scholarly writing[67] and legal judgments describing genocide as "the crime of crimes,"[68] as if implying other crimes are lesser. The *ad hoc* tribunals later adjusted their rulings, observing that all three crimes—genocide, crimes against humanity, and war crimes—are serious[69] and "there is no hierarchy of crimes. . . ."[70] However, current debates about whether the crimes against

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65 For more on the obligation to "prevent" crimes against humanity and the draft crimes against humanity treaty, *see* William A. Schabas, *Prevention of Crimes Against Humanity*, 16 J. INT'L CRIM. JUST. 705 (2018); Piqué, *supra* note 9, at 135; Murphy, *supra* note 64, at 35–52 (identifying six obligations encompassed within the obligation to "prevent" atrocity crimes: states shall not themselves commit acts of atrocities; states shall undertake generally to prevent atrocities; states shall take legislative or other measures to prevent atrocities; states shall cooperate with other states, international organizations and, as appropriate, non-governmental organizations for the prevention of atrocities; states shall not send a person to a place where the person would be in danger of being subjected to an atrocity; and states shall punish atrocities as a means of prevention); Travis Weber, *The Obligation to Prevent in the Proposed Convention Examined in Light of the Obligation to Prevent in the Genocide Convention* 173 (FICHL Publication Series No. 18, 2014). For discussion of the ILC's drafting process, see Jalloh, *supra* note 64, at 332.

66 In the Nuremberg Tribunal judgment, "crimes against peace" (i.e., the precursor to the crime of aggression) were deemed "the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole." The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (IMT), Judgment of 1 October 1946, Part 22, at 421 (August 22, 1946 to October 1, 1946).

67 With due respect to Bill Schabas, the title of his book, and his arguments, may have contributed to the problem identified. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES (2000).

68 Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Appeals Judgment, ¶ 590 (May 26, 2003) ("The Trial Chamber . . . found that the crime of genocide constitutes the 'crime of crimes.'"); Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Trial Judgment, ¶ 16 (Sept. 4, 1998) ("genocide constitutes the crime of crimes"); Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, ¶ 502 (July 31, 2003) ("The Trial Chamber recalls and adopts the description of genocide as 'the crime of crimes,' set down by the Rwanda Tribunal in the Kambanda case and more recently by Judge Wald in her Partial Dissenting Opinion in the Jelisić Appeal Judgement.").

69 Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-T, Trial Judgment, ¶ 451 (Dec. 18, 2008) ("All crimes under the Tribunal's Statute are serious violations of international humanitarian law.").

70 Rutaganda, *supra* note 68, ¶ 590 ("The Appeals Chamber recalls that there is no hierarchy of crimes under the Statute . . . ."); *see also* Prosecutor v. Blaskić, Case No. IT-95-14, Trial Judgment, ¶¶ 800–02 (Mar. 3, 2000) ("The ICTR has . . . supposedly established a genuine hierarchy of crimes" with genocide being the "crime of crimes," but "[t]he ICTY has not yet transposed this hierarchy of crimes

the Rohingya in Myanmar or the Uighurs in the Xinjiang Province of China constitute genocide,[71] illustrate that at least in the perception of the news media, general public, and some officials, this differentiation remains significant.

While genocide is indeed a horrific crime, mass killing that lacks the accompanying special mental state (*dolus specialis*)[72] for crimes to constitute genocide can be no less horrific.[73] For example, because most of the killing by the Khmer Rouge was against other members of the Khmer population in Cambodia in the 1970s, the majority of the killing of an estimated 1.7–2.5 million people[74] fell outside the definition of genocide[75] because the convention was drafted to encompass the killing of *another* national, ethnical, racial, or religious group.[76] 1.7–2.5 million lives lost was indescribably tragic, whether it fitted within the definition of genocide or not.

The twin confluence of (1) rhetoric that genocide is "the crime of crimes," and (2) a treaty source for the obligation to "prevent" genocide but

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to the sentencing phase."). The ad hoc and hybrid international tribunals have not had the crime of aggression included in their statutes, explaining its exclusion from this list.

71 *Compare* Charles Davis, *China is Committing "Crimes against Humanity" with its Treatment of Uyghurs in Xinjiang, Human Rights Group Says*, BUS. INSIDER (Apr. 19, 2021), https://www.businessinsider.com/china-committing-crimes-against-humanity-against-uighurs-in-xinjiang-hrw-2021-4, *with* James Lansdale, *Uighurs: "Credible case" China Carrying out Genocide*, BBC NEWS (Feb. 8, 2021), https://www.bbc.com/news/uk-55973215. *See also* Myra Dahgaypaw, *It is Past Time to Call the Violence Against Rohingya Genocide*, ALJAZEERA (Aug. 25, 2021), https://www.aljazeera.com/opinions/2021/8/25/it-is-past-time-to-call-the-violence-against-rohingya-genocide.

72 For case law on the *dolus specialis* requirement, *see* TRAHAN, *supra* note 56, at 146–68 (compiling ICTY cases); TRAHAN, *supra* note 57, at 17–48 (compiling ICTR cases).

73 Crimes against humanity have many more "underlying crimes" than killing or mass killing (i.e., extermination). *See supra* note 52, at Art. 7(1)(a)–(k) (underlying crimes).

74 CRAIG ETCHESON, AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE 118–20 (2005), as cited in Sadat, *supra* note 43, at xxi, n. 12.

75 *See* Co-Prosecutors v. Khieu Samphan and Nuon Chea, Case 002/2 (Extraordinary Chambers in the Courts of Cambodia) (convicting Nuon Chea and Khieu Samphan at trial of genocide against the Cham and Vietnamese in Cambodia, but not charging the remainder of the killing by the Khmer Rouge as genocide). The case against Khieu Samphan is currently on appeal.

76 The killing in Cambodia is sometimes described as an "auto" genocide, in that Khmer were killing Khmer—something not encompassed by the Convention. *See* Alexander R. J. Murray, *Does International Criminal Law Still Require a 'Crime of Crimes'? A Comparative Review of Genocide and Crimes against Humanity*, 3 GOETTINGEN J. INT'L L. 589, 602 (2011) (". . . the victims of the perpetrator may be negatively defined meaning that the targeted individuals are seen 'as not belonging to, not being affiliated with or not loyal to the perpetrator or the group to which the perpetrator belongs'"). *See also* Sadat, *supra* note 43, at xxi ("For the most part, individuals [in Cambodia] were killed, tortured, starved, or worked to death by the Khmer Rouge not because of their appurtenance to a particular racial, ethnic, religious, or national group—the four categories to which the Genocide Convention applies—but because of their political or social classes, or the fact that they could be identified as intellectuals") (*citing* Power, *supra* note 10, at 87–154.)

no corollary treaty obligation to "prevent" crimes against humanity, likely contributed to states, NGOs, and legal experts periodically being consumed with, and wasting valuable time on, debates over whether mass killing in a particular situation[77] constitutes genocide or not. The (mistaken) assumption seems to be that states have an obligation to act only *if* crimes constitute "genocide." This then creates wariness about denominating crimes to be "genocide," and inaction seemingly more acceptable if atrocities are categorized as crimes against humanity.[78] The development of the "responsibility to protect" ("R2P") clarified the existence of an obligation on the part of the international community to act in the face of genocide, crimes against humanity, war crimes, and ethnic cleansing;[79] however, because R2P is often (inappropriately) minimized as only "soft law,"[80] and has rarely been "operationalized,"[81] the advent of R2P has not fundamentally succeeded in changing the responsiveness of states to mass atrocity crimes.[82]

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77 Killing is not the only crime that underlies genocide charges, but in the genocide cases prosecuted to date, there has not been prosecution of other underlying crimes as genocide (e.g., rape, as a form of genocide, prosecuted in the *Akayesu* case), absent there also having been mass killing. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 688 (Sept. 2, 1998) (rape and other acts of sexual violence constitute infliction of "serious bodily or mental harm" on members of the group).

78 Alas, inaction frequently also results even when crimes are denominated "genocide." The author does not claim that recognition of a legal obligation always or even periodically translates into action to stop crimes. The author utilizes the word "action" expansively, to encompass a variety of ways to try to prevent crimes, including military intervention only as a very last resort.

79 *See, e.g.*, GA Res. 60/1, 2005 World Summit Outcome Document, ¶¶ 138–39 (Oct. 24, 2005). "Ethnic cleansing" is not a defined term under international criminal law. The term's use, however, may have been motivated to propel the international community into action precisely in the situations this author is complaining of—where there is alleged ambiguity if genocide is occurring or not.

80 *See, e.g.*, Jennifer M. Welsh & Maria Banda, *Int'l Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?*, 2 GLOB. RESPONSIBILITY TO PROTECT 3, 213 (2010) (arguing that R2P is soft law); William W. Burke-White, *Adoption of the Responsibility to Protect*, THE RESPONSIBILITY TO PROTECT 34 (Jared Genser & Irwin Cotler eds., 2012) (arguing that R2P is "best understood as a norm of international conduct" and that "the trajectory of the Responsibility to Protect over the past decade is strongly suggestive of its development toward a rule of international law, but further political development and legal process will be required"); Hitoshi Nasu, *The UN Security Council's Responsibility and the "Responsibility to Protect,"* MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, VOL. 15, at 377–418 (2011) ("The responsibility to protect has been widely considered a policy agenda, and not a legally binding commitment by UN Member States."). For discussion of the "hard law" obligations underlying R2P, *see* JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES, ch. 2.2.2 (2020).

81 The Libya intervention was openly described as an exercise of R2P. Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM J. INT'L L. 298, 315 (2012) ("The Libya intervention marked the first time that the Security Council invoked [R2P] to approve the use of force by U.N. member states."). Yet, its questionable success (leaving Libya in an unstable situation for many years post intervention) and the lack of any R2P in Syria have arguably diminished the luster of R2P.

82 R2P has created agreement on the need to act in the face of genocide, crimes against humanity, war crimes and ethnic cleansing, World Summit Outcome Document, *supra* note 79, and it has

An example of the fallacious view that genocide is a more significant crime can be illustrated with respect to the debate about the crimes that were perpetrated in Darfur, Sudan, commencing in 2003–04. The "Janjaweed militia" and Government of Sudan's Armed Forces orchestrated an organized campaign against the Fur, Masalit, Zaghawa, and other ethnic groups within Darfur, in Western Sudan.[83] The underlying crimes included deliberate and indiscriminate attacks, rapes, killings, mass displacements, torture, destruction of property, and looting of livestock.[84] While fatality estimates are often in the 200,000–300,000 range,[85] a more accurate figure is probably 400,000.[86] The "Janjaweed" are Arab nomads,[87] with the Government of Sudan also considered "Arab."[88] The Fur, Masalit, Zaghawa, and other ethnic groups in Darfur, by contrast, identify as "Black Africans," and are predominantly agrarian.[89]

The point is not to rearticulate the debate about whether the killings were or were not genocide—although the facts *very clearly* pointed to the conclusion that they fell squarely within the definition of genocide[90]—but

succeeded in focusing international actors much more on "prevention" and "early warnings."

83 For a chronological discussion of the crimes in Darfur, see TRAHAN, *supra* note 80, ch. 5.2; *see also* ERIC REEVES, A LONG DAY'S DYING: CRITICAL MOMENTS IN THE DARFUR GENOCIDE (2007); ERIC REEVES, COMPROMISING WITH EVIL: AN ARCHIVAL HIST. OF GREATER SUDAN, 2007–2012, http://www.compromisingwithevil.org.

84 *See, e.g.*, *World Report: Sudan*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2006/country-chapters/sudan [events of 2006]; *"Men with No Mercy": Rapid Support Forces Attacks Against Civilians in Darfur, Sudan*, HUM. RTS. WATCH (Sept. 9, 2015), https://www.hrw.org/report/2015/09/09/men-no-mercy/rapid-support-forces-attacks-against-civilians-darfur-sudan [hereinafter, "*Men with No Mercy"*].

85 Over ten years later, the UN and news sources still generally cite the death toll as 200,000–300,000. *See, e.g.*, *Darfur Overview*, UNICEF, https://www.loc.gov/item/lcwaN0022383/.

86 Phillip Manyok, *Oil and Darfur's Blood: China's Thirst for Sudan's Oil*, 4 J. POL. SCI. & PUB. AFF. (2016), https://www.omicsonline.org/open-access/oil-and-darfurs-blood-chinas-thirst-for-sudans-oil-2332-0761-1000189.php?aid=69390 ("The UN Office for the Coordination of Humanitarian Affairs (OCHA) estimated that 396,563 people have died as a result of war in Darfur alone."); Eric Reeves, *Quantifying Genocide: Darfur Mortality Update, August 6, 2010 (updated November 2016)*, SUDAN: RSCH., ANALYSIS, & ADVOC. (Jan. 5, 2017), http://sudanreeves.org/2017/01/05/quantifying-genocide-darfur-mortality-update-august-6-2010/.

87 Jennifer Trahan, *Why the Killing in Darfur Is Genocide*, 31 FORDHAM INT'L L.J. 990, 995 n. 17 (2008) ("The term 'Janjaweed' . . . is reported to be an amalgamation of three Arabic words for ghost, gun, and horse that historically referred to criminals, bandits or outlaws.").

88 The Armed Forces, by contrast, also included Darfuris, who were then ordered to massacre members of their own ethnic groups.

89 UN Secretary-General, Report of the International Commission of Inquiry on Darfur: Rep to the Secretary-General, 18 September 2004, at 3, https://www.un.org/ruleoflaw/files/com_inq_darfur.pdf ("The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called 'African' tribes."). For more extensive background on the conflict and discussion of the crimes, see REEVES, A LONG DAY'S DYING, *supra* note 83; Reeves, *Compromising with Evil*, *supra* note 83**.**

90 *See* Trahan, *supra* note 80.

to note that the international community spent several years debating whether the killings were or were not genocide, years that could have been much more fruitfully focused on trying to prevent additional crimes.[91] Thus, Human Rights Watch, early on, categorized the atrocities as crimes against humanity and war crimes,[92] despite being in possession of documentary evidence suggestive of genocide.[93] A Washington DC-based NGO first came out with a report calling the crimes "genocide,"[94] a position then endorsed by the US House of Representatives and US Senate.[95] US Secretary of State Colin L. Powell also endorsed this position,[96] and, later, then-President George W. Bush announced the same in a speech to the UN General Assembly.[97] The European Union meanwhile first adopted the Human Rights Watch position calling the atrocities crimes against humanity and war crimes,[98] although it later used an odd formulation including, obliquely, the word "genocide."[99] The International Commission of Inquiry

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91 Prevention was also blocked by China using veto threats to weaken Security Council resolutions—resulting in a weakened sanctions regime, and delays in the deployment of peacekeepers, who, when eventually deployed, had a weakened mandate. For a chronological discussion of the crimes in Darfur and how veto threats weakened what the UN Security Council was otherwise prepared to do, *see* TRAHAN, *supra* note 80, ch. 5.2.

92 *Sudan, Darfur in Flames: Atrocities in Western Sudan*, HUM. RTS. WATCH 8, 13 (2004), https://www.hrw.org/reports/2004/sudan0404/sudan0404.pdf (characterizing the crimes as crimes against humanity and war crimes).

93 *See, e.g.*, *Darfur Documents Confirm Government Policy of Militia Support* (July 20, 2004), HUM. RTS. WATCH, http://hrw.org/backgrounder/africa/072004darfur.pdf (detailing the closely coordinated and planned campaign by the Janjaweed and Government of Sudan's Armed Forces).

94 Todd F. Buchwald & Adam Keith, *Any Other Name: How, When, and Why the US Government Has Made Genocide Determinations*, COALITION INT'L JUST., at 100, n. 324 (US Holocaust Memorial Museum March 2019). Buchwald and Keith explain: "The State Department September 2004 report describes the team as 'composed of independent experts recruited by the Coalition for International Justice (CIJ), [which] also included experts from the American Bar Association (ABA), DRL [Bureau of Democracy, Human Rights, and Labor], and the State Department's Bureau of Intelligence and Research (INR) as well as the US Agency for International Development (USAID).'" *See Documenting Atrocities in Darfur*, U.S. DEP'T. OF STATE (Sept. 2004), https://2001-2009.state.gov/g/drl/rls/36028.htm.

95 Declaring Genocide in Darfur, Sudan, H.R. Con. Res. 467, 108th Cong. (2004); A Concurrent Resolution Declaring Genocide in Darfur, Sudan, S. Con. Res. 133, 108th Cong. (2004).

96 Colin L. Powell, The Crisis in Darfur: Testimony Before the Senate Foreign Relations Committee, U.S. Dep't of State (2004), https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm.

97 Press Release, White House, President Speaks to the United Nations General Assembly (2004), https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040921-3.html.

98 "Brussels and the EU member states have been unwilling to characterise the situation in Darfur as genocide." Gareth Evans, *Genocide or Crime? Actions Speak Louder than Words in Darfur*, POLITICO (Feb. 16, 2005), https://www.politico.eu/article/genocide-or-crime-actions-speak-louder-than-words-in-darfur/.

99 *See* European Union, European Parliament Resolution on the Darfur Region in the Sudan, EUR-LEX,https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004IP0012&rid=9 (the resolution "[u]rges the Sudanese authorities to end impunity and to bring to justice immediately the

on Darfur, established by the UN Security Council,[100] concluded that there were crimes against humanity and war crimes occurring with only "isolated acts of genocide."[101] The latter is basically a meaningless formulation,[102] reminiscent of a press briefing during the 1994 Rwanda genocide, when the White House spokesperson suggested "isolated acts" within Rwanda might be genocide.[103]

The international community, in the face of mass killing, should not waste valuable time debating the categorization of crimes, but should focus its efforts on stopping the crimes—whether genocide or crimes against humanity.[104] While precise determinations will be necessary when charging and adjudicating individual criminal responsibility and adjudicating state responsibility,[105] the notion that states only need to "act" to try to "prevent" genocide needs to be soundly and squarely repudiated as a matter of "hard law."[106] Having a crimes against humanity convention, including an obligation to "prevent" crimes against humanity—as contained in the current draft[107]—would help make the obligation of states much clearer. While inclusion of such language still will not guarantee "operationalization" of the legal obligation—the political "will" to act[108]—

planners and perpetrators of crimes against humanity, war crimes and human rights violations, which can be construed as tantamount to genocide").

100 UNSC Res 1564 (18 September 2004), UN Doc. S/RES/1564.

101 The Commission took the view that there was no policy to commit genocide. It found "that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case-by-case basis." UN Secretary-General, *supra* note 89, ¶ 641.

102 Either genocide is occurring, or it is not occurring; there is no middle ground of "isolated acts" being genocide.

103 *See* Samantha Power, *Bystanders to Genocide*, THE ATLANTIC (2019), https://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571 (press briefing: "Well, I think the—as you know, there's a legal definition of this . . . clearly not all of the killings that have taken place in Rwanda are killings to which you might apply that label . . . . But as to the distinctions between the words, we're trying to call what we have seen so far as best as we can; and based, again, on the evidence, we have every reason to believe that acts of genocide have occurred.").

104 The author is not so naïve to suggest the outcome in Darfur would have been different had there been agreement that the crimes were genocide, but it could have contributed to more willingness to be responsive and more pressure that China not use veto threats to weaken Security Council resolutions. *See supra* note 91.

105 "Individual and state responsibility run concurrently." Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT'L L. 553, 561 (2006).

106 *See* sources cited *supra* note 62 (addressing the extent of the obligation currently).

107 Draft Crimes Against Humanity Convention, *supra* note 49, Art. 3.2 ("Each State undertakes to prevent and to punish crimes against humanity . . . .").

108 Political will is blocked in many situations by the veto power of the permanent members of the UN Security Council. *See* TRAHAN, *supra* note 80. Unfortunately, concluding a convention is not expected to change the behavior of the permanent members that are casting vetoes blocking the Council, despite at least nine other members being ready to act, while there is ongoing, or the serious risk of, crimes against humanity. The legality of such conduct, and vetoes in the face of genocide and war crimes,

it could at least help to galvanize momentum in that direction and create clearer legal consequences[109] for inaction in the face of crimes against humanity.

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needs to be challenged, for example, through the General Assembly referring the question of the legality of such vetoes to the International Court of Justice. *See id*. at 242. The idea has been endorsed by numerous prominent individuals and NGOs. *See* Jennifer Trahan, *Concept Note: Legal Limits to the Use of the Veto*, *at* http://www.vetoesinitiative.com/note.pdf.

109 The current draft Crimes Against Humanity Convention, provides that: "Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration." Draft Crimes Against Humanity Convention, *supra* note 49, Art. 15(2).